No. _____

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# Supreme Court of the United States

**October Term, 1997**

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SPENCER ESTATES, et al.,

*Petitioners,*

v.

JAMES A. HENNEFER, et al.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

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## PETITION FOR WRIT OF CERTIORARI

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42 pp

## QUESTION PRESENTED

Does the post trial addition of 14 independent partnerships and private corporations as judgment debtors to two multimillion dollar judgments for punitive as well as compensatory damages, based on an untenable "reverse alter ego" theory, violate the partners' and shareholders' rights to due process of law, where such entities were neither named in the complaint nor represented by counsel at the trial of the subject action, and where they had no notice and no opportunity to be heard before the entry of the court's order adding them to the judgments and depriving them of their property?

## LIST OF PARTIES TO THIS PROCEEDING

The parties to this proceeding include petitioners Spencer Estates, a California Limited Partnership, QCC One, a California Limited Partnership, QCC Two, a California Limited Partnership, D & M One Limited Partnership, D & M Seven Limited Partnership, D & M Eight Limited Partnership, D & M Nine Limited Partnership, Maroloma Construction Corporation, Caldan, Inc., Mardan Enterprises, Mardan Construction, Norco Gardens, a California Corporation, Norco Knolls, a California Corporation, and Starlite Supply Company, a California Corporation, the newly added parties to the amended judgments in the state court; and, respondents James A. Hennefer, Reese L. Milner, II, and Milner Investment Corporation, a California Corporation, the plaintiffs below. Additional respondents include Dan E. Butcher, Mary F. Butcher, Carl Robertson, II, and Herbert Schulze who were defendants in the malicious prosecution action and who were named as real parties in interest as to the extraordinary writ proceedings. They are parties to the amended judgment for compensatory damages. Mr. Butcher and the above petitioners are parties to the amended judgment for punitive damages. Mr. Robertson individually is a party to a separate judgment for punitive damages which is not at issue here.

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| QUESTION PRESENTED | | i |
| LIST OF PARTIES TO THIS PROCEEDING | | ii |
| TABLE OF CONTENTS | | iii |
| TABLE OF AUTHORITIES | | vi |
| OPINION BELOW | | 2 |
| JURISDICTION | | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | | 3 |
| STATEMENT OF THE CASE | | 3 |
| 1. | Introduction | 3 |
| 2. | The Parties. | 5 |
| 3. | The Constitutional Violation - The Successful, Yet Improper Motion to Amend the Judgment. | 5 |
| 4. | The Entry of the Amended Judgments. | 7 |
| 5. | The Unsuccessful Attempts to Procure an Appellate Bond and the Move for an Emergency Stay to Stay Execution. | 8 |
| 6. | The Writ Petition and the Verification of Owner and Beneficiary Debra Butcher Robertson. | 9 |
| 7. | The Opposition to the Writ Petition and the Reply. | 10 |
| 8. | The Summary Denial of the Writ Petition and the Denial of Review by the California Supreme Court. | 13 |

THE URGENT NEED FOR REVIEW BY THIS COURT ..... 13

LEGAL ARGUMENT ..... 15

I.

The Trial Court Commited Reversible Error When It Granted the Motion to Amend the Judgments by Adding Fourteen Independent and Innocent Legal Entities to Two Multimillion Dollar Judgments, as Additional Judgment Debtors, Based on an Untenable "Reverse Alter Ego" Theory, Where Such Entities Were Neither Named in the Complaint Nor Represented at Trial, and Where Absolutely No Evidence Was Introduced to Suggest That the Creation or Existence of These Entities Was in Any Way Concealed. ..... 15

II.

Because the Constitutional Guarantee of Due Process of Law Requires Proper Notice of the Law That Has Been Violated and an Opportunity to Defend Against the Charges of Misconduct, Before Property Rights Are Taken Away, the Amended Judgments Including the Massive Award of Compensatory and Punitive Damages Against the Innocent Petitioners Must Be Set Aside. ..... 24

III.

Conclusion. ..... 29

## TABLE OF AUTHORITIES CITED


| Cases | Page(s) |
|---|---|
| Alexander v. Abbey of the Chimes, 104 Cal.App.3d 39, 163 Cal.Rptr. 377 (1980) | 23 |
| Armstrong v. Manzo, 380 U.S. 545 (1965) | 26 |
| Board of Trustees v. Porini, 263 Cal.App.2d 784, 70 Cal.Rptr. 73 (1968) | 15 |
| Bouie v. City of Columbia, 378 U.S. 347 (1964) | 25 |
| Brunsoman v. Seltz, 414 N.W.2d 547 (Minn.App. 1987) | 28 |
| City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) | 29 |
| Covey v. Town of Somers, 351 U.S. 141 (1956) | 25 |
| Detrio v. United States, 264 F.2d 658 (5th Cir. 1959) | 28 |
| Ducan, Inc. v. Head, 519 So.2d 1305 (Ala. 1988) | 28 |
| Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) | 28 |
| Goldberg v. Kelly, 397 U.S. 254 (1970) | 28 |
| Griffin v. Griffin, 327 U.S. 220 (1946) | 26 |
| Gruendl v. Oewel Partnership, 55 Cal.App.4th 654, 64 Cal.Rptr.2d 217 (1997) | 20 |
| Hollywood Cleaning Company v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709 (1932) | 19 |

Honda Motor Company v. Obers,
512 U.S. 415 (1994) ..... 28
In re Greenwald's Estate,
19 Cal.App.2d 291, 65 P.2d 70 (1937) ... 19, 20
International Brotherhood of Electrical Workers v. Foust,
442 U.S. 42 (1979) ..... 28
Jines v. Abarbanel,
77 Cal.App.3d 702, 143 Cal.Rptr. 818 (1978) 21, 22
Krofcheck v. Ensign Company,
112 Cal.App.3d 558, 169 Cal.Rptr. 516 (1980) 27
Lambert v. People of the State of California,
355 U.S. 225 (1957) ..... 24
Milrot v. Stamper Medical Corporation,
44 Cal.App.4th 182,
51 Cal.Rptr.2d 424 (1996) ..... 17, 18
Minton v. Caveney,
56 Cal.2d 576, 15 Cal. Rptr. 641 (1961) .... 22
Mirabito v. San Francisco Dairy Company,
8 Cal.App.2d 54, 47 P.2d 530 (1935) ..... 22
Motores De Mexicali v. Superior Court,
51 Cal.2d 172,
331 P.2d 1 (1958) ..... 14, 16, 18, 20, 23, 26
Mullane v. Central Hanover Bank & Trust Company,
339 U.S. 306 (1950) ..... 25, 26
Nisenzon v. Sadowski,
689 A.2d 1037 (R.I. 1997) ..... 28
Oyakawa v. Gillett,
8 Cal.App.4th 628, 10 Cal.Rptr.2d 469 (1992) 24
Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1987) ..... 26
Russell v. United States,
369 U.S. 749 (1962) ..... 25
Stirone v. United States,
361 U.S. 212 (1960) ..... 25

Thomson v. L.C. Roney & Company,
112 Cal.App.2d 420, 246 P.2d 1017 (1952) .. 22
Triplett v. Farmers Insurance Exchange,
24 Cal.App.4th 1415, 29 Cal.Rptr.2d 741 (1994)16
Valley National Bank of Arizona v. A.E. Rouse & Company,
121 F.3d 1332 (9th Cir. 1997),
1997 WL 450668, 4 (9th Cir. (Ariz.) ..... 27
Vaugn v. Coccimiglio,
241 Cal.App.2d 676, 50 Cal.Rptr. 876 (1966) . 17
Walker v. City of Hutchinson,
352 U.S. 112 (1956) ..... 25

**Statutes**

California *Code of Civil Procedure*
section 187 ..... 3, 15, 16
California *Evidence Code*
section 500 ..... 16
Corporations Code
section 15632 ..... 20

**Court Rules**

United States Supreme Court Rules,
rule 10(c) ..... 14
rule 14 ..... 5

## Other Authorities

Black's Law Dictionary 77
(6th ed. 1990) . . . . . 21
Dean Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*,
34 UCLA Law Review 431 (1986). . . . . 11
Restatement (First) of Judgments
section 84 (1942) . . . . . 27
2 *Wigmore on Evidence*,
section 290 (2d ed. 1935) . . . . . 16

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## PETITION FOR WRIT OF CERTIORARI

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**To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:**

Absent relief from this Court, the children and grandchildren of Dan and Mary Butcher, and others, will surely face financial ruin. The petitioners, the newly added parties to two multimillion dollar amended judgments, Spencer Estates, a California Limited Partnership, QCC One, a California Limited Partnership, QCC Two, a California Limited Partnership, D & M One Limited Partnership, D & M Seven Limited Partnership, D & M Eight Limited Partnership, D & M Nine Limited Partnership, Maroloma Construction Corporation, Caldan, Inc., Mardan Enterprises, Mardan Construction, Norco Gardens, a California Corporation, Norco Knolls, a California Corporation, and Starlite Supply Company, a

California Corporation (collectively referred to as "Spencer Estates" or the "petitioners"), respectfully pray that a writ of certiorari be issued to review the decision rendered by the Court of Appeal of the State of California. The petitioners ask that this Court act immediately in order to avoid confiscation of their property. This case presents an important issue of due process of law, where the petitioners were summarily added as parties to two multimillion dollar judgments, despite neither being named in the complaint nor represented at trial, and where there was absolutely no evidence that the existence or creation of Spencer Estates was in any way concealed.

## OPINION BELOW

No opinion was rendered below. A copy of the Court of Appeal's order denying the petition for writ of supersedeas and other relief is set forth in Appendix B.

## JURISDICTION

The California Court of Appeal filed an order summarily denying Spencer Estates' petition for writ of supersedeas, or other appropriate order for an immediate stay of execution on the amended judgments entered by the trial court on May 22, 1997. [Appendix B.] The petitioners subsequently filed a petition for review in the California Supreme Court. The California Supreme Court filed its order denying review on July 9, 1997. [Appendix C.] On that date, the judgments of the trial court [Appendices D and E], became final as to the State of California.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. section 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the Fourteenth and Eighth Amendments to the Constitution of the United States. The relevant portions of these amendments are set forth in Appendices F. The case also involves application of California *Code of Civil Procedure* section 187, the full text of which is set forth in Appendix F.

## STATEMENT OF THE CASE

### 1. Introduction.

Spencer Estates and the other petitioners are owned, in whole or in part, by the Butcher family trusts created long ago by Mr. and Mrs. Dan Butcher, pursuant to an estate plan devised by their estate planning attorneys. The trust beneficiaries include the Butchers' 18 children and grandchildren. The children and others have ownership interests in the petitioners.[1]

The trial court added the petitioners as parties to two multimillion dollar judgments for compensatory and punitive damages under a "reverse alter ego" theory, even though none of the petitioners harmed the plaintiffs in any way.

The trial court improperly added Spencer Estates and the other petitioners as parties to the amended judgments despite the complete lack of evidence showing that 1) the trusts are alter egos of Mr. Butcher, and he created them to somehow hinder the plaintiffs from collecting on the

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[1] The only exception to this in the list of entities added as parties to the amended judgments is Mardan Construction. Neither the petitioners nor Mr. Butcher is related to this entity.

judgments; 2) the Butcher children and others were at all responsible for the plaintiffs' damages; or 3) the Butcher children and others had notice and opportunity to defend themselves against the plaintiffs' claims.

The amount of the amended judgments far exceeds the total net worth of the defendants named in the amended judgments. Accordingly, the court's ruling placed a fiscal stranglehold on the interests of the Butchers' children and grandchildren and others who hold minority interests in Spencer Estates (collectively referred to as "the children"). Having already protected their interests by filing abstracts of judgments, the plaintiffs will undoubtedly now execute on the judgments and confiscate properties belonging to the petitioners, 14 innocent entities.

Notice of charges and an opportunity to be heard are essential components of due process of law; and, here, no notice or an opportunity to be heard was given. Notably, Spencer Estates was never charged with any type of misconduct during any phase of the litigation until after the trial. The petitioners urge this Court to recognize and affirm their fundamental right to due process of law, including proper notice and an opportunity to defend themselves before they can be added as parties to the $33.6 million judgments, and to provide much needed guidance for lower courts which are asked to determine whether property rights should be forfeited.

Accordingly, Spencer Estates and the other petitioners respectfully request this Court to issue a writ of certiorari. The issuance of a writ of certiorari would promote fairness and equity and protect the constitutionally protected rights of innocent people.

**2. The Parties.**

Plaintiffs James Hennefer, Reese Milner, II, and Milner Investment Corporation sued Mr. and Mrs. Dan Butcher, their son-in-law, Carl Robertson, II, and attorney Herbert Schulze, alleging malicious prosecution and other claims.[2] *Hennefer v. Butcher, et al.*, Los Angeles Superior Court case number SWC 113245. The defendants Dan E. Butcher, Mary F. Butcher, and Carl Robertson, II, ("the defendants"), answered the complaint.

Spencer Estates and the other petitioners were not named as defendants at any time. Consequently, they were not represented at trial. After a lengthy jury trial and the return of a $33.6 million verdict against the defendants, two judgments were originally entered against the defendants, but not the petitioners.

**3. The Constitutional Violation - The Successful, Yet Improper Motion to Amend the Judgment.**

The plaintiffs moved to amend the judgments by adding numerous entities such as Spencer Estates as parties to the amended judgments. These moving papers were not served on Spencer Estates and the other petitioners. Consequently, they had no proper notice of, or opportunity to be heard on this critical issue.[3]

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[2] Only those detailed citations to the record of the Court of Appeal required by rule 14 of the *Supreme Court Rules* are included in this petition. The petition for writ of supersedeas, Appendix G, contains additional detailed citations to the record.

[3] Because the petitioners received no adequate notice of the motion to amend, they had no opportunity to file written opposition to the plaintiffs' motion in the court of first instance, and were not represented by counsel at the hearings of the motion. [See, Appendix G, writ petition for supersedeas, pp. G-4, 5, 7-11, 13, 18, 20,

According to the plaintiffs, Mr. Butcher's trial and deposition testimony showed that he owned, controlled, or was the sole general partner in many of the petitioners. From this, the plaintiffs surmised that Mr. Butcher used the petitioners to "evade the judgments," and that the petitioners were his "alter egos." Mr. and Mrs. Butcher, however, undisputedly established the exact opposite.[4] Mr. Butcher's testimony, and his declaration submitted with the defendants' opposition, showed that he transferred certain assets to different partnerships or trusts over a period of several years as part of an estate plan developed by his estate planning attorneys.

The petitioners own the companies which hold certain real estate properties. The defendants pointed out that the plaintiffs had submitted no evidence supporting their contention that Mr. Butcher was trying to hide any assets or defraud any creditors. The entities were instead owned and controlled by the Butchers' children. For example, Caldan, Inc. is over 95 percent owned by Debra Butcher Robertson and her brother Dan Edward Butcher. The petitioner trust owns *less than 5 percent.*

The defendants further asserted that, in any event, the court should have rejected the plaintiffs' argument to impose liability on the entities for the acts of an individual, not acting on behalf of the entity. This was a clear denial of the children's rights to due process of law. [See Appendix I, pp. 1-3.]

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22-23, 30-31, 33-34; Appendix I, transcript of April 10, 1996 hearing of motion to amend judgments, pp. 1-3.]

[4] The independently represented named defendants filed written opposition to this extraordinary motion, written objections to the plaintiffs' proposed amended judgments, and other responses to the plaintiffs' papers.

After shifting the burden of proof to the *defendants* during the hearing of the motion to amend the judgment, the trial court granted the plaintiffs' motion.[5] The plaintiffs then submitted a proposed amended judgment for compensatory damages. The court later requested the plaintiffs to resubmit a corrected amended judgment, if they also wished to add the same entities to a separate judgment for punitive damages. The defendants objected again, asserting that, there was no evidence presented in support of the reverse alter ego theory; and the court improperly shifted the burden of proof onto them.

Additional disputes arose over the amended judgments. At a telephonic hearing, the Butchers' attorney, Robert Schachter, emphasized that he did *not* represent the entities, and, therefore, the petitioners had no proper notice and opportunity to be heard. [Appendix I, p. 1-3.] Nevertheless, the court granted the motion to amend. [Appendix I, p. 1-3.]

**4. The Entry of the Amended Judgments.**

The court entered the amended judgments on April 11, 1996. [Appendices D and E.] The petitioners and the defendants filed a notice of appeal from the amended judgments. *Hennefer v. Butcher*, California Court of Appeal case no. Second Civil B100352. One of the issues on appeal is did the trial court commit reversible error by amending the judgments to include Spencer Estates

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[5] Improperly treating the defendants and the petitioners as one and the same, the trial court stated:

> "[I]f there's going to be a burden on either party, I'm going to place the burden on you [the Butcher defendants] rather than then [sic] because they've had the burden since 1977 or '78, and I'll grant the motion." [26 R.T. 5779; see Appendix I, pp. 1-4.]

and the other petitioners as parties. This issue is distinct from the one raised in this petition, where the petitioners seek the issuance of a writ of certiorari and a stay of execution.

### 5. The Unsuccessful Attempts to Procure an Appellate Bond and the Motions for an Emergency Stay of Execution.

Mr. and Mrs. Butcher are financially unable to satisfy the judgments. Mr. Butcher and his bankruptcy attorney contacted every surety in the telephone directory, but none would accept real property as collateral for an appellate bond to stay execution on the judgments. This is a generally accepted rule in the surety industry.

Six of the petitioners filed for bankruptcy under Chapter 11. Over the objections of the Butchers and the petitioners, the Bankruptcy Court issued an order dismissing these Chapter 11 cases, adopting the plaintiffs' calculated strategy to allow for a stay on execution of the judgments only if a $4 million bond was posted. The reduced bonding requirement may at first appear reasonable. In reality, however, a bond of no amount could be procured when the only collateral which the Butchers could put up for a bond is encumbered real estate. The plaintiffs undoubtedly knew this when they suggested a $4 million bond.

The petitioners unsuccessfully moved for an emergency stay on execution of the judgments with both the United States Bankruptcy Court and the Bankruptcy Appellate Panel of the United States Court of Appeals for the Ninth Circuit. The Bankruptcy Appellate Panel denied the motions for a stay on April 10, 1997.

The plaintiffs obviously intend to execute on the amended judgments as evidenced by their notice of intended sale of property.

### 6. The Writ Petition and the Verification of Owner and Beneficiary Debra Butcher Robertson.

On May 14, 1997, the petitioners filed a petition for writ of supersedeas, and asked for a stay on the execution of the amended judgments. [Appendix G.] They emphasized that a writ of supersedeas is proper in light of the dire circumstances of imminent execution and given that they will likely prevail on this issue on appeal. According to the petitioners, the trial court violated their rights to due process of law when it granted the motion to amend the judgments. [Appendix G, pp. 4, 5, 7-11, 13, 18, 20, 22-23, 30-31, 33-34.] Specifically, they received no proper notice and had no opportunity to be heard. *Id.* The court's ruling was especially improper where the plaintiffs failed their burden of establishing the requisite elements for an alter ego claim, and where the court shifted the burden of proof to the defendants. Lastly, and most importantly, the petitioners were innocent of any wrongdoing, and could not, in fact, be the alter egos of Mr. Butcher.

The petition included a verification signed by Mr. and Mrs. Butcher's daughter, Debra Butcher Robertson. In her verification, Mrs. Robertson established that she is one of the primary beneficiaries of the family trusts established by her parents. She also stated that none of the entities is her father's alter egos, and that he has taken no action to defraud or to hide assets from any creditors. Mrs. Robertson is, in fact, the secretary of Caldan, Inc., and she owns 47.62 percent of Caldan's stock. Her brother, Dan Edward Butcher, owns an equal amount of Caldan stock.

Mrs. Robertson further stated that she had always considered the business a family business. She and her brother Dan invested their monetary inheritances into the family business. Beginning at age 11, she had worked for

the family business for over 20 years, giving her all, sacrificing evenings and weekends at the expense of her personal life. Her brother, Gary Butcher, worked for the family business for approximately 13 years, and also sacrificed to work long hours.

According to Mrs. Robertson, her parents, Dan and Mary Butcher, are 79 and 75 years old, respectively. Her brothers Dan and Gary are 41 and 52 years old, and she is 42 years old. The family trusts were not secretly created. Their sole purpose was to be part of her parents' estate planning program. Her father had considered estate planning for years. She added that, with the death of several family members and close friends, and with her parents' advancing age, the reality that death could occur at any time "hit home." Over a period of approximately 15 to 20 years, her father contacted different attorneys and took various initial steps to set up an estate planning program to benefit his children and grandchildren. Around 1990, her father contacted an attorney who began setting up different trusts for estate planning purposes. Each trust owns different corporations and limited partnerships, which, in turn, hold various real estate assets. He retained different interests in the entities. His estate planning attorneys made the decisions regarding how to transfer any assets. Lastly, Mrs. Robertson attested that the livelihood of the 18 Butcher children and grandchildren were all at stake. If the plaintiffs were allowed to execute on the amended judgments, they would be allowed to unfairly claim the hard work and sacrifice of two generations of family building.

### 7. The Opposition to the Writ Petition and the Reply.

The plaintiffs filed an opposition in which they ignored the relevant law and facts, and instead relied on irrelevant, if not misleading, "factual" statements, and accusations of perjury and other hyperbole directed at Mr. Butcher but not the petitioners. The opposition primarily consisted of a vitriolic attack on Mr. Butcher.[6]

The petitioners refuted all of the plaintiffs' allegations of "lies" and "fraud" in their reply by highlighting the plaintiffs' misrepresentations. For example, the plaintiffs offered no evidence about Mr. Butcher's alleged employment status at the time when the writ petition was filed. The plaintiffs also selectively quoted from bankruptcy court records.

In their reply, the petitioners emphasized that Spencer Estates and the other petitioners were owned and controlled by the Butcher children. Mr. and Mrs. Butcher gave various portions of The QCC Two, The D&M Seven Limited Partnership, The D&M Eight Limited Partnership, and The D&M Nine Limited Partnership, to the following 14 individuals: Gary James Butcher, Debra Ann Robertson, Dan Edward Butcher, Kirsten Candace Ames, Katrina Anna Ames, Tiffany Proffit Magnier, Jason Dennis Butcher, Garrison Wells, Cash Austin Robertson, Michael John Butcher, Stephanie Ann Butcher, Dane Brandon Robertson, Rebecca Charlotte Butcher, and Mary Susan Butcher, by "virtue of the love and affection which" Mr. and Mrs. Butcher had for their family. Mr. Butcher held only

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[6] Vilification of one's opponent is a desperation measure, which "has no place in the lexicon of an attorney." *Pilch v. Milikin*, 200 Cal.App.2d 212, 216, fn.1, 19 Cal.Rptr. 334 (1962). See Dean Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA Law Review 431, 436 (1986).

a 23.75 percent interest in the D&M Seven and D&M Eight Partnerships.

According to the petitioners, since Mr. and Mrs. Butcher, and the petitioners all sought the protection of the bankruptcy laws, the plaintiffs unquestionably had detailed information as to all of these judgment debtors. They knew, for example, that the assets of the Butchers, and the petitioners are almost entirely in the form of heavily encumbered real property, and that the total equity of all of these judgment debtors was approximately $8 million. Given the plaintiffs' knowledge of Mr. Butcher's finances, and the well publicized economic recession and the resulting "crash" of the California real estate market, the plaintiffs' suggestion that Mr. Butcher's net worth was $35 million when the writ petition was filed, the same amount that he was allegedly worth in 1988, was misleading.

The plaintiffs secondly contended that the defendants "lied" about the trial judge's actions. Spencer Estates maintained that the record, however, spoke for itself. The record clearly showed that, after trial, the judge improperly imposed the burden of proof on the petitioners. Additionally, the record conclusively established that the petitioners had never been involved in the malicious prosecution litigation, and had no proper notice or an opportunity to defend themselves against the plaintiffs' motions to add them as parties to the two multimillion dollar judgments. [Appendices I, p. 1, 2; G, pp. 7, 10-11, 13, 18, 20, 22-23, 30-31, 33-34, and H, pp. 1, 2-4; 53 C.T. 12500-12507.]

Lastly, Spencer Estates stressed that the plaintiffs grossly misrepresented the record of the bankruptcy court with respect to a third purported "lie" about Mr. Butcher's alleged ability to post a bond. The bankruptcy court record revealed that surety companies are not authorized to issue

bonds with already encumbered real estate as collateral, especially when abstracts of judgment have been filed as to that real estate. Spencer Estates pointed out that even if those abstracts of judgment were released, and a bonding company could be found to issue a bond secured by the petitioners' real estate, the plaintiffs would gain nothing. They would simply have the same security that had been already given to them by the abstracts of judgment.

### 8. The Summary Denial of the Writ Petition and the Denial of Review by the California Supreme Court.

On May 22, 1997, the Court of Appeal summarily denied the petition for writ of supersedeas. [Appendix B.] Subsequently, Spencer Estates and the other petitioners filed a petition for review in the California Supreme Court. [Appendix H.] The petitioners argued in their petition for review that their rights to due process of law were violated as they had no notice or opportunity to be heard before being deprived of their property. [Appendix H.]

On July 9, 1997, the California Supreme Court denied the petitioners' petition for review, thereby making the orders of the trial court [Appendix A], affirmed by the Court of Appeal, final as to the State of California. [Appendix B.]

## THE URGENT NEED FOR REVIEW BY THIS COURT

This case presents an issue of law and public policy of national importance. Because of the Court of Appeal's denial of the petition for writ of supersedeas, the Butcher children, grandchildren, and others face financial ruin, and were denied their fundamental rights to due process of law

guaranteed by the Fourteenth Amendment to the United States Constitution. This includes notice of, and an opportunity to be heard before they were added as parties to the $33.6 million judgments.

When the trial court erroneously granted the motion to amend the judgments based on the "reverse alter ego" theory, it concluded that an innocent corporation can be held liable for the purported sins of an individual part owner. The trial court flaunted the California Supreme Court's decision in *Motores De Mexicali v. Superior Court*, 51 Cal.2d 172, 331 P.2d 1 (1958). The petitioners submit that the trial courts' decision to ignore that case, and the Court of Appeal's affirmance of that ruling, demonstrate that lower courts are in desperate need of additional guidance and clarification in this area of the law.

Minimum standards of due process must be upheld, before a post trial amendment of any judgment is permitted. Spencer Estates and the other petitioners should at least receive proper notice of the charges on which the amended judgments are based and an opportunity to rebut the plaintiffs' erroneous claims. No proper notice or opportunity to be heard was afforded to the petitioners in this case. Thus, the amended judgments must be set aside. Accordingly, Spencer Estates and the other petitioners respectfully urge that this Court grant this petition for writ of certiorari. *United States Supreme Court Rules*, rule 10(c).

## LEGAL ARGUMENT

### I.

### The Trial Court Commited Reversible Error When It Granted the Motion to Amend the Judgments by Adding Fourteen Independent and Innocent Legal Entities to Two Multimillion Dollar Judgments, as Additional Judgment Debtors, Based on an Untenable "Reverse Alter Ego" Theory, Where Such Entities Were Neither Named in the Complaint Nor Represented at Trial, and Where Absolutely No Evidence Was Introduced to Suggest That the Creation or Existence of These Entities Was in Any Way Concealed.

Based on an improper shifting of the burden of proof, the trial court erroneously granted the plaintiffs' motion to amend the multimillion dollar judgments to add Spencer Estates and the other petitioners as additional judgment debtors. While a trial court may have the discretion to adopt a process to confer jurisdiction, such discretion is not unlimited under section 187 of the California *Code of Civil Procedure*. Generally, this discretion is "not a whimsical, uncontrolled power, but a legal discretion which is subject to the limitations of the legal principles governing the subject or its action, and [subject to] reversal on appeal where no reasonable basis for the action is shown. [Citation.]" *Board of Trustees v. Porini*, 263 Cal.App.2d 784, 792-794, 70 Cal.Rptr. 73 (1968). Specifically, a trial court does not have broad "sweeping power" to correct a judgment, as was done here,

by adding innocent entities as judgment debtors. See, *Motores De Mexicali*, 51 Cal.2d 172, 175, 331 P.2d 1, 2 (1958). While section 187 can allow for flexibility in proceedings, "it has *never* been construed to allow imposition of liability on an entity which was never a party to the action." (Emphasis added.) *Triplett v. Farmers Insurance Exchange*, 24 Cal.App.4th 1415, 1420, 29 Cal.Rptr.2d 741, 743 (1994).

Not only is a court's discretion limited in California, but the burden of proof on a discretionary motion is normally on the moving party. California *Evidence Code* section 500 provides that where a fact is essential to a plaintiff's claim for relief, the burden of proving and showing that fact is on the plaintiff. A trial court does not have the authority to ignore this well settled rule of evidence and arbitrarily shift the burden of proof from the moving party to the opposing party. This, however, is precisely what occurred at bench.

Here, the plaintiffs sought relief in the form of amended judgments to include 14 separate additional entities as parties to the judgment. They unquestionably failed their burden of establishing all of the requisite elements of their reverse alter ego theory. After recognizing that the plaintiffs had failed to meet their burden on their motion, the trial court incredibly shifted the burden of proof to the defendants, and then granted the plaintiffs' motion.

Relying on the classic treatise, *Wigmore on Evidence*, section 290, page 179 (2d ed. 1935), one California appellate court cogently explained:

> " 'The opponent whose case is a denial of the other party's affirmation . . . may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the

> burden of producing evidence has shifted [e.g. when the opponent "willfully suppresses" evidence], the opponent has no call to bring forward any evidence at all . . . [H]is failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden' [Citation.]" *Vaugn v. Coccimiglio*, 241 Cal.App.2d 676, 678, 50 Cal.Rptr. 876, 878 (1966).

At bench, the trial court ignored the above principles when it shifted the burden of proof onto the defendants and then granted the plaintiffs' motion. This alone is sufficiently prejudicial to justify reversal of the amended judgments.

Having failed to demonstrate that the defendants had "willfully suppressed evidence," the plaintiffs had the burden of establishing that the court had jurisdiction over the issue; and the other entities were the alter egos of defendant Dan Butcher. *Milrot v. Stamper Medical Corporation*, 44 Cal.App.4th 182, 187, 51 Cal.Rptr.2d 424, 427-428 (1996). The *Milrot* court found that the lower court's order amending a judgment to add another entity as a judgment debtor was void for lack of jurisdiction and reversed the judgment. Further, the appellate court observed that an attorney representing two *other* defendants had no authority to appear on behalf of the new corporation. The court concluded that plaintiff Milrot failed to satisfy his burden of establishing jurisdiction or show that his burden was excused. "A presumption without the necessary foundation cannot establish jurisdiction." 44 Cal.App.4th at 187, 51 Cal.Rptr.2d at 427-428. Mere

suspicion or speculation was simply insufficient in *Milrot*, and it is likewise insufficient here.

Just as in *Milrot*, the petitioners at bench were not named as defendants in any pleadings, and were neither served with the complaint nor the motion to amend the judgments. *Id.* Moreover, in both cases, the new parties "proceeded directly to the status of judgment debtor without ever being a defendant." 44 Cal.App.4th at 185. Analogous to the situation in *Milrot*, the trial court here ignored the fact that the petitioners were *not* represented at the hearings of the motions. [Appendix I.] Accordingly, the plaintiffs failed to meet their burden of establishing jurisdiction over them, and the amended judgments are void.

In any event, the application of the alter ego doctrine here has no basis as a matter of fact, common sense, equity, or law. Under the alter ego doctrine, an individual may be held liable for the contractual obligations of a corporation, if the individual dominates and controls the corporation in an improper manner. See, *Motores De Mexicali*, 51 Cal.2d 172, 331 P.2d 1 (1958). The plaintiffs seek the exact opposite. They contend that innocent corporations and partnerships who neither controlled nor dominated the malicious prosecution action should be held liable for the conduct of an individual.

Specifically, the plaintiffs allege that Mr. Butcher has certain ownership interests in the entities, and supposedly established them to hide his assets from the plaintiffs. However, the trial and deposition testimony of Mr. Butcher establish that he held complete interests in precious few, if any, of the 14 entities, and possibly even no interest in some of the entities. Based on the plaintiffs' showing of evidence, one cannot tell. The plaintiffs, moreover, offered no relevant evidence to show that the

assets were deliberately hidden as they suggested. In sharp contrast, both Mr. Butcher and his daughter Mrs. Robertson unequivocally established that the trusts were formed for estate planning purposes. Any transfers were done *before* Mr. Butcher was aware of any liability to the plaintiffs. Accordingly, the factual basis for the plaintiffs' motion was completely insufficient.

As a matter of common sense even, the plaintiffs' assertion of alter ego is untenable. If the plaintiffs' "reasoning" is followed, then every time where an individual shareholder of General Motors Corporation is allegedly liable for malicious prosecution for acts that he did not do in the name of General Motors, the plaintiff in that malicious prosecution case could add General Motors as a party to a judgment. This is obviously nonsensical and cannot be true. Predictably, California law follows logic and it is well settled that the mere ownership of stock does not constitute being an alter ego. *In re Greenwald's Estate*, 19 Cal.App.2d 291, 295, 65 P.2d 70, 72 (1937), quoting *Hollywood Cleaning Company v. Hollywood Laundry Service*, 217 Cal. 124, 17 P.2d 709 (1932). Moreover, appellate courts have required a showing:

> "[T]hat there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice."

The scanty "evidence" submitted by the plaintiffs here fails to show a unity of interest or an injustice or fraud on the court. As to the first requirement, the evidence indicates that 79 year old Mr. Butcher is semi-retired and has little, if any, decision making power in his former

businesses. At most, he oversees certain aspects of a few entities. He is certainly not the petitioners and they are not him. The plaintiffs presented little, if any, evidence that Mr. Butcher and the independent corporations and partnerships added to the amended judgments were one and the same.

As for the second requirement articulated by the court in *Greenwald's Estate*, or the equitable considerations, it is the *very application* of the alter ego doctrine which created both an injustice and a fraud on the court. Innocent people who had nothing to do with the underlying case stand to lose everything now that they have been added as parties to the $33.6 million judgments. Spencer Estates "in no way participated," much less "controlled" the defense of the malicious prosecution action. As the California Supreme Court recognized in *Motores De Mexicali v. Superior Court*, 51 Cal.2d 172, 331 P.2d 1 (1958), an entity which did not participate in the underlying litigation cannot, in all fairness, be added as a party to the resulting judgment.

Even more compelling is the plight of the other partners in the limited partnerships, which constitute some of the petitioners. The order applying this novel and unsupported reinterpretation of a well recognized, but strictly limited, doctrine of *corporate* law is especially improper when applied to the limited partnerships. *Gruendl v. Oewel Partnership,* 55 Cal.App.4th 654, 64 Cal.Rptr.2d 217 (1997); California *Corporations Code* section 15632. The *Gruendl* court held that the trial court erroneously imposed liability on a limited partner based upon testimony that he was the alter ego of the limited partnership. To so hold would be to ignore the status of the limited partnership, and the express statutory limitations on a limited partner's liability for the partnership's debts.

The amendment to the judgments was a fraud on the court because the plaintiffs' motion was granted on the faulty premise that Mr. Butcher "owned or controlled" all of these "alter ego" entities. In reality, his trial and deposition testimony shows just the opposite. At most, Mr. Butcher has an interest in, but not control over, some of the entities. His children and others held substantial ownership interests in the petitioners. The plaintiffs should not be rewarded for perpetuating such fraud to obtain windfall amendments to the judgments at the expense of innocent people.

Accordingly, it is most equitable here *not* to add the other entities as parties to the multimillion dollar judgments. Doing so created both an injustice to the innocent petitioners and a fraud on the court.

The alter ego doctrine may also operate with respect to certain obligations arising in tort, such as a case in which a fraud is committed by a corporation for the benefit of an individual. Stated otherwise, the doctrine permits a court to disregard a purported separate corporation and find an individual culpable "for acts knowingly and intentionally done *in the name of the corporation.*" (Emphasis added.) *Black's Law Dictionary* 77 (6th ed. 1990). See *Jines v. Abarbanel*, 77 Cal.App.3d 702, 715, 143 Cal.Rptr. 818, 825 (1978). The essence of the alter ego doctrine is that a person should not be permitted to stand behind the corporation as a shield, where the corporation has acted improperly as to third parties.[7]

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[7] In *Jines*, the court adopted the California Supreme Court's reasoning in another case and observed that the alter ego term is generally used in reference to situations where there is an "abuse of corporate privilege." 77 Cal.App.3d at 715, 143 Cal.Rptr. at 825, quoting *Minton v. Caveney*, 56 Cal.2d 576, 579, 15 Cal. Rptr. 641 (1961). Here, the plaintiffs failed to point to *any* evidence that Mr.

The trial court, however, applied it to the exact opposite situation here. Such application has never been done by any California court in any published decision. In two cases cited below by the plaintiffs, *Thomson v. L.C. Roney & Company*, 112 Cal.App.2d 420, 246 P.2d 1017 (1952), and *Mirabito v. San Francisco Dairy Company*, 8 Cal.App.2d 54, 47 P.2d 530 (1935), both courts stated that the plaintiff had to show that the entities, and *not* the individuals or parties to the original judgment, had used the individuals in order to hide the entities' assets. At bench, however, the plaintiffs argued the *reverse*. According to the plaintiffs, Mr. Butcher, used the petitioner entities to hide his assets, and the petitioner entities are his alter egos. It is undisputed that Spencer Estates and the other petitioners are innocent. They did not prosecute any lawsuit against the plaintiffs, much less do so maliciously. Most tellingly, the plaintiffs have alleged no wrongdoing on the part of the petitioners.

If the plaintiffs wished to have the trial court amend the judgments to include the petitioners under the alter ego doctrine, the plaintiffs, as the moving parties, had the burden of proving that Mr. and Mrs. Butcher were culpable of wrongdoing done knowingly and intentionally in the name of the entities. The plaintiffs failed to point to any evidence that Mr. or Mrs. Butcher did anything improper in the name of the entities in their moving papers and

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Butcher did any wrongful "acts knowingly and intentionally" in the name of the entities, or somehow abuse the corporate privilege. The corporations, in fact, were not his to which he could invoke any privilege.

opposition to the writ petition.[8] This is not surprising, because it never happened.[9]

Based on the law and the facts of this case, there can be no proper amendment to the judgments. The plaintiffs failed to establish the requisite elements for the application of the alter ego doctrine. Accordingly, the judgment may eventually be reversed as to the petitioners, if not also as to the named defendants, and the issuance of a writ of certiorari at this time is most warranted. This is especially true given the denial of Spencer Estates' right to due process of law under the Fourteenth Amendment of the United States Constitution. Specifically, the petitioners were summarily added as parties to the judgment without any opportunity to present any of their positions in court. Just like in *Motores De Mexicali*, 51 Cal.2d 172, 331 P.2d 1 (1958), the court here violated the petitioners' guaranteed rights to due process that "[a]ny person [such as the Butcher children] against whom a claim is asserted in judicial proceedings shall have the opportunity to be heard and to present his defenses." 51 Cal.2d at 175.

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[8] Aside from a bald claim about Spencer Estates' alleged involvement in the malicious prosecution matter, the plaintiffs say nothing about the involvement of any of the 13 other entities improperly added to the amended judgments.

[9] Even assuming for the sake of argument that the alter ego doctrine could apply, the plaintiffs failed their burden of showing that they acted with due diligence. *Alexander v. Abbey of the Chimes*, 104 Cal.App.3d 39, 47, 163 Cal.Rptr. 377 (1980). According to the plaintiffs' moving papers, Mr. Butcher's deposition testimony contains evidence showing that he was the alter ego of the entities. If this is true, which the petitioners contend it is not, the plaintiffs should not have waited until after trial to ask the court to amend the judgments.

Other courts have also held that, "considerations of due process preclude the addition of a party after the judgment is a fait accompli." See for example, *Oyakawa v. Gillett*, 8 Cal.App.4th 628, 632, 10 Cal.Rptr.2d 469, 471 (1992). The *Oyakawa* court recognized that it is erroneous to add a spouse to a judgment as an additional judgment debtor in an action where the added spouse was not named and had no chance to defend an underlying claim. 8 Cal.App.4th at 631, 10 Cal.Rptr.2d at 471. Likewise, the innocent children at bench had nothing to do with the alleged malicious prosecution action. As explained in greater detail below, as a matter of due process, the petitioners should not have been added as parties to the amended judgments, and this Court must grant this petition for writ of certiorari.

## II.

## Because the Constitutional Guarantee of Due Process of Law Requires Proper Notice of the Law That Has Been Violated and an Opportunity to Defend Against the Charges of Misconduct, Before Property Rights Are Taken Away, the Amended Judgments Including the Massive Award of Compensatory and Punitive Damages Against the Innocent Petitioners Must Be Set Aside.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California*, 355 U.S. 225 (1957). In *Lambert*, this Court declared that:

> "Engrained in our concept of due process is the requirement of notice. Notice is

> sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

In coming to the above conclusion, this Court relied on cases which "involved only property interests in civil litigation." 355 U.S. at 228. However, the right to notice is "equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson*, 352 U.S. 112, 115-116 (1956). See also, *Covey v. Town of Somers*, 351 U.S. 141 (1956). The requirement of notice includes fair warning of what the law prohibits. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In addition, the particular illegal conduct must be specified. *Stirone v. United States*, 361 U.S. 212 (1960); *Russell v. United States*, 369 U.S. 749 (1962). As noted above, the requirement of notice applies equally in civil and criminal cases.

Long ago in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), this Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. The Court observed that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at minimum they require that deprivation of

life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313. The notice in *Mullane* was insufficiently specific, because the beneficiaries of the trust were not notified of the right to have the trustee answer for negligent or illegal impairment of their interests. The beneficiaries were also not notified about the fact that fees might be allowed that would diminish payments to them. 339 U.S. at 313.

Importantly, "a judgment entered without notice or service violates the Due Process Clause." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1987); see also, *Armstrong v. Manzo*, 380 U.S. 545 (1965) (failure to give notice violates "the most rudimentary demands of due process of law"). "Due process forbids any exercise of judicial power substantially affecting a defendant's rights without notice." *Griffin v. Griffin*, 327 U.S. 220, 231 (1946).

At bench, without proper notice and an opportunity to be heard, innocent people who had nothing to do with this case stand to lose everything now that they have been added as parties to the $33.6 million judgments. They had no opportunity to be heard and present their defenses. *Motores De Mexicali*, 51 Cal.2d 172, 176, 331 P.2d 1, 3 (1958). The plaintiffs made absolutely *no* attempt to send or otherwise give proper notice of the motion to amend the judgments to any of the petitioners. This undeniably constitutes a denial of due process of law under the Fourteenth Amendment of the United States Constitution. *Id.* Accordingly, the trial court erroneously and inequitably added the petitioners as parties to the amended judgments.

The egregiousness of what occurred in this case is especially evident upon analysis of the rights of the other partners to some of the petitioners. In *Krofcheck v. Ensign*

*Company*, 112 Cal.App.3d 558, 169 Cal.Rptr. 516 (1980), the plaintiff obtained a judgment against a partnership in Utah, which he sought to enforce against one of the partnership's partners in California. 112 Cal.App.3d at 560-61. The partner had been neither named nor served in the Utah action, but had purportedly participated in the defense. 112 Cal.App.3d at 561-62, 567. The plaintiff argued that his Utah judgment was enforceable against the partner under the Restatement (First) of Judgments section 84 (1942), which provides, in pertinent part, that, "[a] person who is not a party but who controls an action . . . is bound by the adjudications of litigated matters as if he were a party." 112 Cal.App.3d at 567, 169 Cal.Rptr. 516.

The court rejected this argument, holding that while "a nonparty who controls litigation may be collaterally estopped in respect to an issue which is litigated therein," control does not render a nonparty liable on the judgment against the partnership itself. 112 Cal.App.3d at 567, 169 Cal.Rptr. 516. The Ninth Circuit Court of Appeals and other state courts have also refused to enforce judgments against unnamed partners because "'due process prohibits the enforcement of a judgment against a person who had no opportunity to defend on the question of liability.'" *Valley National Bank of Arizona v. A.E. Rouse & Company*, 121 F.3d 1332 (9th Cir. 1997), 1997 WL 450668, 4 (9th Cir. (Ariz.)) (holding that the judgment cannot be enforced against the partnership, or against the individual partners, because they were neither served nor named in the underlying lawsuit), quoting *Brunsoman v. Seltz*, 414 N.W.2d 547, 549 (Minn.App. 1987).[10]

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[10] See, for example, *Nisenzon v. Sadowski*, 689 A.2d 1037, 1048 (R.I. 1997) ("To the extent the judgment purports to bind the unnamed Park City partners in their individual capacities without their having

Importantly, here the other stockholders and partners in the limited partnerships were "condemned to suffer a grievous loss." *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The extent to which procedural due process must be afforded "depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." 397 U.S. at 262. The petitioners' interest in not becoming parties jointly and severally liable for the $33.6 million judgments clearly outweighs any competing concern about the administrative cost of proper notice and a hearing. This is especially true where the innocent petitioners were summarily punished by being made liable for *$12 million dollars* in *punitive* damages.

"[P]unitive damages pose an acute danger of arbitrary deprivation of property," as was done to the petitioners here. *Honda Motor Company v. Obers*, 512 U.S. 415, 432 (1994). Such damages are comparable to "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); see also *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 49 (1979).

The very purpose of awarding punitive damages is to punish a defendant whose wrongful conduct was intentional or malicious and to deter him and others from similar conduct in the future. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). At bench,

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been afforded notice and an opportunity to be heard, it is void as violative of their due process rights."); *Ducan, Inc. v. Head*, 519 So.2d 1305, 1308 (Ala. 1988) ("In an action on a judgment, one may not obtain relief broader than the judgments sued on. The partners must have due process of law."); *Detrio v. United States*, 264 F.2d 658, 660 (5th Cir. 1959) ("Undoubtedly the partnership law that requires personal service on a partner to bind his individual assets is required by concepts of procedural due process.").

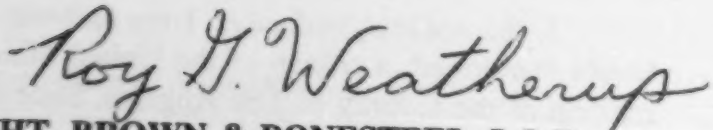
however, where the petitioners have done absolutely nothing wrongful to the plaintiffs, the judgment of punitive damages is baseless. Lastly, the trial court's arbitrary decision to add Spencer Estates and the other petitioners as parties to the amended judgments, at a hearing of which they had no notice, and hence had no opportunity to rebut the plaintiffs' unfounded claims, constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

## III.
## Conclusion.

If there is any substance to the constitutional due process right to notice and opportunity to be heard before the execution of the amended judgments against the petitioners, then relief must be granted in this case. Spencer Estates and the other petitioners have been made responsible for $33.6 million judgments without warning as to the legal standard for awarding such damages, without notice of any charges of wrongdoing, and without any opportunity to be heard and defend against the charges. The petitioners, therefore, respectfully urge the Supreme

Court of the United States to grant this petition for writ of certiorari in order to consider this issue.

Respectfully submitted,



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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of 18 and not a party to the within action or proceeding; my business address is 1620 26th Street, Suite 4000 North, Santa Monica, California 90404-4038; that on October 6, 1997, I caused to be served by U.S. Mail on interested parties in said action the within *Petition for Writ of Certiorari* by placing true copies thereof enclosed in sealed envelope(s) addressed as follows:

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I declare under penalty of perjury that the above is true and correct. Executed on October 6, 1997 at Santa Monica, California.

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Yoginee Patel
*(Original Signed)*